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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH A. CHADWICK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 532 F. 2d 773. The opinion and supplemental opinion of the district court (Pet. App. 32a-63a) are reported at 393 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on March 29, 1976. On April 19, 1976, Mr. Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including May 28, 1976. The petition was filed on May 26, 1976, and was granted on October 4, 1976 (A. 83). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a search warrant is required before federal agents may open a locked footlocker that is properly in

their possession and that they have probable cause to believe contains contraband.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. 881(a) provides in part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> • • • • •
>
> (3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).
>
> • • • • •

STATEMENT

1. On May 8, 1973, Amtrak railroad officials informed federal narcotics agents in San Diego, California, that respondents Gregory Machado and Bridget Leary had loaded a brown trunk or footlocker onto a train bound for Boston, Massachusetts (Pet. App. 34a) and that the officials believed the footlocker to contain "a large quantity of marihuana" (A. 53). The basis for this belief was that the footlocker was leaking talcum powder, which is often used to mask the odor of controlled substances such as marijuana or hashish (A. 15), that the footlocker had an unusual weight for its size (A. 17), and that Machado matched a profile used by the railroad to spot drug traffickers (Pet. App. 34a). The federal agents relayed this information to their counterparts in Boston.

The train arrived at South Station in Boston on the evening of May 10, 1973, and federal agents met it at the station. The agents saw Machado make a telephone call after his arrival, but they were unable to see the number called or to overhear the conversation (Pet. App. 35a). They also observed the footlocker as it was removed from the train, placed on a baggage cart, and taken to the station area, where it was claimed by Machado and Leary. The two then placed the trunk on the floor nearby their suitcases and sat down on it (Pet. App. 3a).

The agents confirmed their suspicions by having a dog trained to recognize the smell of contraband substances approach the footlocker.[1] The dog "alerted" to the footlocker by scratching on it, indicating that a controlled substance was inside. The agents did not have the dog sniff the suitcases (Pet. App. 4a, 35a).

Respondent Joseph Chadwick soon arrived at the station in an automobile. After talking with Machado and Leary for a moment, Chadwick left the terminal, went outside to

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[1] Investigation with the aid of a trained dog is permissible under the Fourth Amendment. *United States* v. *Solis*, 536 F. 2d 880 (C.A. 9); *United States* v. *Race*, 529 F. 2d 12 (C.A. 1); *United States* v. *Bronstein*, 521 F. 2d 459 (C.A. 2), certiorari denied, 424 U.S. 918; *United States* v. *Fulero*, 498 F. 2d 748 (C.A. D.C.).

the street, and opened the trunk of the car. With the assistance of a porter, Leary and Machado took their belongings to Chadwick's car and loaded the footlocker and one suitcase into the trunk; Leary took the other suitcase and entered the front seat (Pet. App. 35a, 52a-53a). While the automobile trunk was still open and Chadwick and Machado were standing beside it, the agents arrested all three respondents. A search of the two men produced a small quantity of marijuana on Chadwick and a key to and receipts and documents of ownership of the footlocker on Machado. Respondents were then taken to the agents' office in the federal building in Boston (A. 43). The footlocker and the two suitcases were also taken to the agents' office, where, approximately 90 minutes after the arrests and seizure, they were opened. Inside the footlocker and both suitcases the agents found substantial amounts of marijuana (Pet. App. 5a, 7a, 8a, 35a-36a).

2. On November 2, 1973, an indictment returned in the United States District Court for the District of Massachusetts charged respondents Machado, Leary and Chadwick with possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with conspiracy to commit that crime, in violation of 21 U.S.C. 846. Respondents filed pretrial motions to suppress incriminating statements made by Chadwick after his arrest and the evidence obtained from the footlocker and the suitcases. In reply, the government argued that the search of the suitcases was a proper inventory inspection, necessary to protect agents against charges that they had stolen property that had been seized. It justified the opening of the footlocker both as a search incident to an arrest and as a search based upon the "automobile exception" to the Warrant Clause of the Fourth Amendment. The district court rejected each of these arguments and suppressed the evidence obtained from

the searches (Pet. App. 45a-51a, 54a-61a). It also suppressed Chadwick's statements, holding that there had not been probable cause to arrest him and that the statements were tainted fruit of the illegal arrest (*id.* at 37a-44a, 62a-63a).

3. A divided court of appeals affirmed the suppression of the marijuana found in the footlocker.[2] The court concluded that the footlocker had been properly seized (Pet. App. 17a, 19a). It then inquired whether it was reasonable to open it. Beginning with the premise that warrantless searches are presumptively unlawful in the absence of one of a few narrow circumstances, the court stated that "[t]he question • • • is whether [this] warrantless search fits

[2] The court of appeals also affirmed the district court's suppression of respondent Chadwick's statements and the marijuana found in the suitcases. We do not agree that there was not probable cause to arrest Chadwick or that his admissions, after receiving *Miranda* warnings (A. 30), were necessarily the product of his allegedly illegal arrest (see *Brown* v. *Illinois*, 422 U.S. 590), but we did not present these as questions for this Court because they appear to involve only the application of settled principles to particular facts. As to the opening of the suitcases, we believe that under many circumstances it is reasonable to inspect personal belongings discovered near a person at the time of his arrest in a public place, a proposition with which the court of appeals has agreed. See Pet. App. 23a; *United States* v. *Eatherton*, 519 F. 2d 603 (C.A. 1), certiorari denied, 423 U.S. 987. In the present case, however, the agents did not have probable cause to believe that the suitcases contained contraband, and the only justification offered in the court of appeals for the inspection was the agents' desire to "inventory" their contents, a justification that presents problems distinct from those concerning the search of the footlocker on probable cause. See *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976; *United States* v. *Friesen*, C.A. 9, No. 75-1199, decided November 12, 1976. Under these circumstances, we did not seek review of the judgment of the court of appeals insofar as it affirmed the district court's suppression of the marijuana seized from the suitcases.

within one of the exceptions to the constitutional requirement of a warrant" (*id.* at 8a). It concluded that it did not.

The "automobile exception" did not control, the court held, because the seizure of the footlocker occurred just after it had been deposited in the parked car's trunk and before any effort had been made to drive the car away. In these circumstances, the car "was nothing more than a platform or resting place for the footlocker," and the court perceived no reason "why the footlocker's placement in the car trunk should make it any more searchable than if the arrest had occurred in the station area" (*id.* at 10a).

The court also held that the opening of the footlocker could not be justified as incident to the arrest of respondents. Noting that the trunk was securely locked and weighed approximately 200 pounds, the court held that the trunk was not "in any meaningful sense • • • under [respondent's] immediate control" at the time of their arrest, because they could not have either quickly removed it or reached inside it to destroy evidence or obtain weapons (*id.* at 15a).

Finally, the court rejected the argument that movable containers, such as footlockers, that are properly seized in a public place, should be treated like automobiles and should be subject to search, without a warrant, if probable cause exists to believe that they contain evidence of a crime. The court conceded that "baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such items may disappear before a warrant is obtained" (Pet. App. 17a). Expressly declining to follow other courts of appeals in this regard, however, the court refused to permit the warrantless search of the footlocker. The court believed that a rule allowing the search of such belongings on probable cause has not "received sufficient

recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the fourth amendment warrant requirement" (*ibid.*). It concluded that "[i]f an exception of this character is to be translated to an entirely different class of objects, we think the Supreme Court should make the judgment" (*id.* at 18a-19a).

The dissenting judge, aligning himself with other courts that the majority had declined to follow, argued that the opening of the footlocker was proper once "there was probable cause to believe that it contained contraband and was being used in committing the offense" (Pet. App. 29a). In his view, "the principles which control the right of an officer to arrest without a warrant a person who is committing a felony in his presence in a public place should also permit the officer to open a suitcase, a footlocker or other container which he has probable cause to believe is being used to commit the offense in his presence and to seize the contraband therein" (*id.* at 29a-30a; footnote omitted).

ARGUMENT

I. INTRODUCTION AND SUMMARY

The federal narcotics agents who arrested respondents at South Station on the evening of May 10, 1973, had probable cause to believe that the footlocker in respondents' possession contained a controlled substance. Their seizure of the footlocker without a warrant, as the court of appeals agreed, was unquestionably reasonable under the circumstances. The court held, however, that, without regard to whether the agents' conduct in searching the footlocker immediately upon its removal to their offices was similarly reasonable, the search violated the Fourth Amendment because it did not fall within one of "a few specifically estab-

lished and well-delineated exceptions" to the constitutional requirement of a warrant.

This case thus raises once again an issue that has sparked the "conflict that has been so notable in this Court's attempts over a hundred years to develop a coherent body of Fourth Amendment law" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 474). This conflict has been "caused by disagreement over the importance of requiring law enforcement officers to secure warrants" (*ibid.*). The underlying basis of that disagreement was summarized by Mr. Justice Stewart in *Coolidge* (*id.* at 474-475; footnote omitted):

> Some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

This case (unlike *Coolidge*) does not involve "a search or seizure carried out on a suspect's premises" and therefore does not implicate the "accepted • • • principle, that [such] a search or seizure • • • without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances' " (403 U.S. at 474-475). Rather, it involves the kind of search and seizure with regard to which there has been uncertainty and disagreement "about the basic rules to be applied" (*id.* at 475).

A. Our primary submission is that the guiding standard of the Fourth Amendment is reasonableness (see *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976, slip op. 5-6) and that not all interferences with a person's liberty or privacy are of equal magnitude or demand equal protection. Whether a search or seizure is reasonable within the meaning of the Fourth Amendment must depend "upon the facts and circumstances of each case" (*Cooper* v. *California*, 386 U.S. 58, 59) and "the context in which [the Fourth Amendment right] is asserted" (*Terry* v. *Ohio*, 392 U.S. 1, 9). Each governmental intrusion must be tested both by its justification—which generally will be probable cause to believe that contraband or evidence of the commission of a criminal offense will be found in the area searched—and by the strength of the privacy interests invaded by the search.

In making this argument, we are not disputing what "is by now axiomatic[,] that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause' " (*Almeida-Sanchez* v. *United States*, 413 U.S. 266, 277 (Powell, J., concurring)), nor are we denying that both the concept of probable cause

and the presence or absence of a warrant must be considered as bearing on the reasonableness of a search. We do contend, however, that not all warrantless searches are unreasonable *per se* merely because a warrant could have been but was not obtained. Whether a warrantless search or seizure should be deemed presumptively unreasonable must depend upon a discriminating appraisal of whether the particular privacy interest at stake is sufficiently important that any intrusion must be justified not only by probable cause but also by a determination of probable cause by a neutral and detached magistrate in advance of the search.

B. This view finds support both in the text of the Fourth Amendment, which secures "persons, houses, papers, and effects, against unreasonable searches and seizures • • •," and in its historical underpinnings. While the Warrant Clause of the Amendment ensures that warrants shall not issue except upon probable cause and the satisfaction of a number of procedural requisites, the historical evidence indicates that that provision was not intended by the Framers to alter the plain meaning of the initial clause or to render every search undertaken without a warrant unreasonable in the absence of exigent circumstances. Indeed, the relevant "legislative history" suggests that the primary, if not the sole, purpose of the Fourth Amendment was to prohibit the use of so-called "general warrants" rather than to prohibit warrantless searches, that the initial drafts of the Amendment accomplished this purpose and nothing more, and that the language ultimately adopted may have been the result of oversight.

It is not surprising that the Congress that wrote the Fourth Amendment was more troubled by the evils of searches backed by defective warrants than by searches

without warrants. The Framers' prime concern was with the search of the home. Although a warrant had always been necessary for such entries, the requirement had been abused. The Amendment was the product of the recent experience with general warrants, under which entries into and rummaging of the home had been authorized and executed by the King's agents without probable cause to believe that a crime had been committed or that evidence would be found therein. Such warrants were eventually condemned by the English courts and thereafter by Parliament, and it was the intent of the Framers to write that condemnation into the Constitution.

Warrantless searches, on the other hand, evolved in an entirely different historical context and led to none of the same abuses. Such searches occurred outside the dwelling, so that the privacy interest was significantly less, and their victims ordinarily were those who had been caught in the act of committing a crime or were the objects of hue and cry or an arrest warrant. Accordingly, it was early concluded that the privacy of an individual at the time of a search incident to an arrest was sufficiently protected by the requirement for probable cause underlying the arrest. The lawful restraint and incidental search were not considered to entail the kind of wholesale and wide-ranging invasion of privacy for which a warrant requirement in connection with a home was considered appropriate, and the Framers were instead content to leave such searches to the test of reasonableness.

C. Although not expressly articulated, this analysis pervades the Court's decisions and explains the tensions in the Court's Fourth Amendment jurisprudence to which Mr. Justice Stewart adverted in *Coolidge*. The Court has recognized that the conflicting interests of the individual to be free of unjustified searches and seizures and of society to

apprehend and punish those suspected of crime should be accommodated by strict enforcement of the requirement of probable cause, and that only in those privacy areas "at the core of the Fourth Amendment" (*Wolf* v. *Colorado*, 338 U.S. 25, 27)—areas in which, both for historical and practical reasons, antecedent judicial scrutiny contributes substantial protection to the privacy right—should the determination of reasonableness be inextricably bound with the requirement of a warrant. In other cases, "the Court [has] held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable • • •." *United States* v. *Edwards*, 415 U.S. 800, 807.

Thus, the Court has identified certain contexts, primarily the search of homes, offices, or private communications, in which the intrusion so impinges upon an individual's expectation of privacy that a warrantless search or seizure, even upon probable cause, is considered unreasonable *per se* "subject only to a few specifically established and well-delineated exceptions" (*Katz* v. *United States*, 389 U.S. 347, 357). In contexts in which core privacy interests are not similarly implicated, such as the search of an automobile on a public street, the reasonableness of the intrusion has been held to depend solely upon the sufficiency of the justification, *i.e.*, the existence of probable cause, rather than upon the presence or absence of a warrant (see *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42). And yet other types of searches and seizures have been considered sufficiently limited in intrusiveness that their reasonableness not only does not depend upon procurement of a warrant but may rest on suspicion not amounting to probable cause (see, *e.g.*, *United States* v. *Brignoni-Ponce*, 422 U.S. 873; *Terry* v. *Ohio*, *supra*).

D. Application of this calculus to the facts of the present

case demonstrates the reasonableness of the agents' conduct. The agents did not search a home, a place of business, or similar areas—those places for which a warrant historically has been required and for which prior resort to a magistrate would assist greatly in the minimization of the intrusion. Nor did they search personal effects that could be found only by entering private premises (see, *e.g.*, *Coolidge* v. *New Hampshire*, *supra*; *Chimel* v. *California*, 395 U.S. 752). Nor, lastly, was the search an invasion of a person's private thoughts or communications, a "core" privacy interest as to which the locus of the intrusion may fairly be deemed irrelevant.

Rather, the agents searched a movable container that they had probable cause to believe contained contraband and that they encountered in a public place under circumstances recognized by the court of appeals to justify seizing it forthwith. Once that lawful intrusion had occurred, respondents' privacy interest in the contents of the footlocker had diminished to the point that a further intrusion, on probable cause, should not be held to require the prior interposition of a magistrate. As this Court stated in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51-52, to insist upon a search warrant in such circumstances as a necessary ingredient of reasonableness would be to demand precise and wholly unworkable calculations as to what constitutes the "greater" and what the "lesser" intrusion. The value to whatever privacy interest respondents retained in the footlocker that would have been derived from prior judicial approval of the search in this case was insignificant in view of the precisely defined contours of the search.

E. Finally, respondents' privacy interests in their personal effects was further substantially reduced by the fact that they were under arrest at the time of the search. As Mr. Justice Powell observed in *United States* v. *Robinson*,

414 U.S. 218, 237-238 (footnotes omitted), "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." Since respondents had already suffered the "serious personal intrusion" of an arrest (*United States* v. *Watson*, 423 U.S. 411, 428 (Powell, J., concurring)), their legitimate expectation of freedom from governmental interference with the footlocker formerly in their possession was insufficient to create an inhibition upon a search of the footlocker on probable cause that could only be removed by the antecedent scrutiny of a magistrate.

While the footlocker may not have been under respondents' "immediate control" (*Chimel* v. *California*, *supra*, 395 U.S. at 763) at the moment of their arrest, that restriction on the scope of a search incident to arrest developed in response to the search of houses or other high-privacy areas conducted without either probable cause or a warrant and based solely on the fortuity of the arrest in that location. It has little relevance, and should have no application, to a search of the belongings of a person who has been arrested in public, where probable cause exists to believe the chattel contains contraband or evidence of a crime related to the arrest.

F. In sum, the rule we urge would provide protection wholly commensurate with the Fourth Amendment interests involved. Searches and seizures that invade areas in which an individual places the greatest expectation of privacy would be presumptively unreasonable in the absence of probable cause and a warrant. Other intrusions, in which the privacy expectation is less and in which a warrant has relatively little useful role to play, would satisfy the Fourth Amendment if they were justified by probable cause and were otherwise reasonable. In every case the subject of the search would have the opportunity for a determination of probable cause by a neutral and detached judicial officer; moreover, law enforcement officers would retain substantial incentives to seek such judicial scrutiny in advance of the search because of the greater deference given to findings of probable cause when a warrant has been obtained. *United States* v. *Ventresca*, 380 U.S. 102, 106; *Aguilar* v. *Texas*, 378 U.S. 108, 111.

II. A WARRANT IS NOT REQUIRED TO MAKE A PROBABLE CAUSE SEARCH OF A CONTAINER THAT HAS BEEN LAWFULLY SEIZED IN A PUBLIC PLACE

A. Searches without warrants are not presumptively unreasonable under the Fourth Amendment

The Fourth Amendment imposes two separate, although related, limitations upon searches and seizures. The first clause of the Amendment "is general and forbids every search that is unreasonable" (*Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357); the second clause places a number of restrictions upon the issuance and character of warrants. Although the Amendment itself does not suggest the interrelation between the two clauses, the Court has stated on a number of occasions that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, *supra*, 389 U.S. at 357. See also *United States* v. *United States District Court*, 407 U.S. 297, 314-321; *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 454-455. It was

on this statement that the court of appeals relied in upholding the district court's suppression of the evidence seized from respondents' footlocker.

We submit that the conclusion of the court of appeals was erroneous. History provides no indication that the proponents of the Fourth Amendment equated warrantless searches and seizures occurring outside the privacy of the home with unreasonable searches and seizures. Nor has any decision of this Court applied a presumptive warrant requirement in a context other than a search of the home or other "core" area of privacy. On the contrary, the search of the footlocker in this case is constitutionally indistinguishable from the warrantless search of an automobile that has been seized on a public street, the reasonableness of which has repeatedly been upheld if based on probable cause.

1. *The historical background of the Fourth Amendment suggests that searches conducted without a warrant were not equated with unreasonable searches*

The Fourth Amendment's proscription of "unreasonable searches and seizures" must be read in light of "the history that gave rise to the words"—a history of "abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution • • •." *United States* v. *Rabinowitz,* 339 U.S. 56, 69 (Frankfurter, *J.*, dissenting).[3]

[3] The history and evolution of the Fourth Amendment have been discussed at length in the decisions of this Court (see, *e.g.*, *Stanford* v. *Texas*, 379 U.S. 476, 481-485; *Marcus* v. *Search Warrant*, 367 U.S. 717, 724-729; *Frank* v. *Maryland*, 359 U.S. 360, 363-365; *Harris* v. *United States*, 331 U.S. 145, 157-161 (Frankfurter, J., dissenting); *Boyd* v. *United States*, 116 U.S. 616, 624-629) and in scholarly treatises (see Taylor, *Two Studies in Constitutional Interpretation* 3-46 (1969); Landynski, *Search and Seizure and the Supreme Court* 19-48 (1966);

The cornerstone of the protection accorded an Englishman from intrusions into his privacy has always been the integrity of the home, a protection that has been traced back to biblical times (Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-14 (1937)) and that was reflected in Lord Coke's aphorism that "every man's house is his castle." *Semayne's Case,* 3 Coke Rep. 91a (Fraser ed., pt. 5). At early common law, the principle was so strongly entrenched that the search warrant was unknown and any unconsented entry onto the land of another was a trespass. Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law,* 49 Calif. L. Rev. 474, 475 (1961). While this extreme position eventually gave way to necessity, the absolute sanctity of the home continued until well into the late middle ages. As Lasson writes (pp. 34-35, n. 78):

> In 1470 • • • it was decided that although it was lawful for an owner of goods to enter upon the land of another who had wrongfully taken them from him, he could not break into his house. *Yearbooks,* 9 Edw. IV, Mich. Pl. 10, cited in Holdsworth, III, 279. A constable broke doors to search at his peril in hue and cry. Sir Matthew Hale, *History of the Pleas of the Crown* (Philadelphia, 1847), II, 98-104. A debtor's house was always considered his asylum and could not be broken into. James Paterson, *Commentaries on the Liberty of the Subject* (London, 1877), II, 231 ff.

The first major exception to this rule occurred in the case of the warrant to search for stolen goods, a judicial order that "crept into the law by imperceptible practice" (*Entick* v. *Carrington,* 19 How. St. Tr. 1030, 1067, 95 Eng. Rep. 807) but that was firmly established by 1650. The victim of a theft could obtain a warrant to search the premises of another if he was willing to swear—on pain of

Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-105 (1937).

answering in damages if he were in error—that he reasonably suspected that the stolen goods would be found. Barrett, *Personal Rights, Property Rights, And The Fourth Amendment,* 1960 Sup. Ct. Rev. 46, 50. The stolen goods warrants also encompassed two forms of contraband—goods on which the proper tax had not been paid and the means or instrumentalities of a crime. Kaplan, *supra,* 49 Calif. L. Rev. at 475.

While the warrant for stolen goods breached the sanctity of the home, it was surrounded by procedural safeguards such as an allegation of probable cause under oath, and it could only be issued by a court. During the last decades of the 17th and the first half of the 18th century, however, several events occurred that convinced the colonists that a warrant, without more, was an inadequate protection against abuse of the privacy of the home. By the time of Charles II, there developed the widespread use of general warrants, first sanctioned by statute but later issued under the King's inherent authority, in order to find evidence among the papers of suspects accused of seditious libel and similar crimes. Unlike the stolen goods warrants, these warrants were issued by the executive rather than the courts, and they authorized, without specificity or a showing of probable cause, the arrest of any person and the search of any dwelling for evidence. Lasson, *supra,* at 37, 42; Fraenkel, *Concerning Searches and Seizures,* 34 Harv. L. Rev. 361, 362-363 (1921).

The validity of these general warrants went virtually unquestioned until 1762, when John Wilkes, a member of Parliament, began publication of a series of anonymous pamphlets known as *The North Briton,* which attacked the ministers as "tools of despotism and corruption" and were

critical of the policies of the government.[4] After the publication on April 23, 1763, of *The North Briton,* No. 45, which accused the King, among others, of dishonestly and dishonorably negotiating a peace treaty with France, Lord Halifax, the Secretary of State, issued a general warrant to four messengers, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers." Lasson, *supra,* at 43. The messengers proceeded to arrest and imprison some 50 suspects in three days and to seize large quantities of their private papers. Among those arrested was Wilkes, whose protests against the legality of the general warrants became a national issue (*id.* at 43-44).

On Wilkes' urging, several printers who had been arrested and whose homes had been ransacked brought suit against the messengers for trespass, assault and false imprisonment. Although the messengers defended by relying upon the Halifax warrant, Chief Justice Pratt declared the warrant to be illegal and upheld the verdict of £ 300, stating that "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject." *Huckle* v. *Money,* 2 Wils. K.B. 206, 207, 95 Eng. Rep. 768, 769. Wilkes then sued Robert Wood, an aide to Lord Halifax who had supervised the execution of the warrant, and he obtained a similar heavy verdict. *Wilkes* v. *Wood,* 19 How. St. Tr. 1153, 98 Eng. Rep. 489. The messengers ap-

[4] See generally 3 Churchill, *A History of the English-Speaking Peoples—The Age of Revolution* 165-169 (1957).

pealed, but the judgments were affirmed. *Leach* v. *Money*, 19 How. St. Tr. 1001, 97 Eng. Rep. 1075.

At approximately the same time, another, more celebrated, attack on the use of general warrants occurred. In November 1762 Lord Halifax had issued a warrant for the arrest and seizure of the books and papers of John Entick, "the author, or one concerned in the writing of several weekly very seditious papers, entitled 'The Monitor or British Freeholder * * *'." *Entick* v. *Carrington, supra,* 19 How. St. Tr. at 1031. After Entick was arrested, his house thoroughly searched, and his personal papers seized, he sued the messengers in trespass and recovered £ 300. The Court of Common Pleas, sitting *en banc,* upheld the verdict in an opinion "welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country" (*Boyd* v. *United States,* 116 U.S. 616, 626). Chief Justice Camden proclaimed:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. * * * By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass or even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

Entick v. *Carrington, supra,* 19 How. St. Tr. at 1066.

After surveying the precedents, Lord Camden could find no justification for the general warrants. In particular, they were not like the warrants issued to search for stolen goods (*id.* at 1067):

> Observe too the caution with which the law proceeds in this singular case. —There must be a full charge upon oath of a theft committed. —The owner must swear that the goods are lodged in such a place. —He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description. —And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.
>
> On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehavior. —To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.
>
> If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; would require proofs beforehand; would call upon the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all of these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

Within two years, in April 1766, the House of Commons resolved that the seizure of papers in cases of libel was illegal and that general warrants were universally illegal except in cases provided for by act of Parliament. 19 How. St. Tr. at 1074-1075.

Evidence of the dangers of the general warrant was not limited to one side of the Atlantic. Also fresh in the minds of those who drafted the Constitution were the writs of assistance, which were general search warrants authorizing customs officials in the Colonies to enter anywhere during daylight hours to search for smuggled goods. See *Stanford* v. *Texas*, 379 U.S. 476, 481-484. The writs were in many ways more objectionable than the general warrants, since, unlike the warrants, which were directed toward a particular case of libel, the writs were "not returnable at all after execution, but [were] good as a continuous license and authority during the whole lifetime of the reigning sovereign." Lasson, *supra*, at 54. See also Landynski, *supra*, at 30-31.

The death of George II in October 1760 and the resulting expiration of the outstanding writs six months later led the merchants of Boston to petition the courts that the writs not be renewed. The merchants were represented in their cause by James Otis, Jr., whose oration before the Superior Court of Massachusetts electrified the colonists (2 *Legal Papers of John Adams* 142-144 (Wroth and Zobel ed. 1965)):

> Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry

> —their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. • • • Again these writs ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.

Although Otis' words were persuasive, the Crown's power to issue the writs was eventually upheld, and subsequent acts of Parliament clearly signaled the intention that they be enforced. See Landynski, *Search and Seizure and the Supreme Court* 33-36 (1966); Lasson, *supra*, at 62-66.

Two conclusions important to a consideration of the proper role of search warrants under the Fourth Amendment are apparent from this brief historical discussion. One is that the colonists' chief, if not exclusive, concern with unreasonable searches and seizures was directed toward unjustified intrusions into the home. It was against the background of a history of lawless entry into a man's home under the guise of authority, followed by wholesale search through his papers and possessions, that the Fourth Amendment was adopted. The right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" in essence entailed for the Framers "the right to shut the door on officials of the state unless their entry is under proper authority of law." *Frank* v. *Maryland*, 359 U.S. 360, 365.[5] The home was

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[5] "Indisputably the 'searches and seizures' on the agenda at the time the fourth amendment was written were the rummagings of the English messengers and colonial customs officers. We can reconstruct with some fair confidence what 'the

the area in which the greatest expectation of privacy was placed and over which the great battles of Wilkes, Entick, and Otis, involving the general warrants and the writs of assistance, had been fought. Indeed, it is fair to say that the historical record reflects no similar concern by the colonists and their British contemporaries at the spectre of an unjustified search or seizure of chattels that had voluntarily been removed from the dwelling. Taylor, *Two Studies in Constitutional Interpretation* 39, 43 (1969).

The second, related conclusion to be drawn from the historical record is that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." Taylor, *supra*, at 41. As Professor Taylor has observed (*ibid.*):

> It is perhaps too much to say that they feared the warrant more than the search, but it is plain enough that the warrant was the prime object of their concern. Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods—an interesting use of a practice already obsolescent to limit and mitigate a current and dangerous practice.

framers' thought of those. It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy." Amsterdam, *Perspectives On The Fourth Amendment*, 58 Minn. L. Rev. 349, 398 (1974). See also Fraenkel, *supra*, 34 Harv. L. Rev. at 365 ("It is, therefore, apparent that the Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.'").

Nothing in the pertinent history suggests that the Framers were troubled by warrantless searches outside the home or that the Fourth Amendment was intended to upset the settled practice allowing such searches if supported by probable cause.[6] Searches outside the privacy of the home, after all, "involved none of the abuses against which Otis and Camden railed. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest warrant," and it was accepted that "their persons [should] be subject to search for the fruits of their crimes, or the weapons, clothes, or other objects that might identify them as felons * * *. Here was no threat to the honest householder, no fear of arrogant 'messengers' breaking open desks or trunks to search for smuggled jewels or libellous documents. What need for a warrant to justify a search that was so natural a concomitant of apprehending and convicting a dangerous cutthroat?" Taylor, *supra*, at 39.

2. *Evidence of events contemporaneous with the adoption of the Constitution indicates that the Framers were concerned with general warrants rather than warrantless searches and did not intend to alter the settled historical distinction between warrantless searches of buildings and of other places*

The Framers' preoccupation with general warrants rather than warrantless searches is borne out by the constitutions adopted by the colonial legislatures after independence was declared. Between 1776 and 1783, at least

[6] Compare *United States* v. *Watson*, 423 U.S. 411 (Fourth Amendment not intended to modify common-law rule permitting warrantless arrests on probable cause in a public place).

eight States—Virginia,[7] Pennsylvania,[8] Delaware,[9] Maryland,[10] North Carolina,[11] Vermont, [12] Massachusetts,[13] and New Hampshire [14]—adopted declarations of rights that included a provision on searches and seizures, and "[i]n all of them the warrant is treated as an enemy, not a friend." Taylor, *supra*, at 41. See also *Henry* v. *United States*, 361 U.S. 98, 100-101; Lasson, *supra*, at 79-82. While many of these early constitutions also stated the broader principle of freedom from unreasonable searches and seizures, the wording of these provisions "seems to show that the general principle was stated merely as a basis for the minor premise condemning general warrants and that the abuse attempted to be prevented was that of general warrants only." Lasson, *supra*, at 81, n. 10.

This historical concern is further confirmed by the "legislative history" of the Fourth Amendment itself. In proposing the adoption of that provision, James Madison's statement to the House of Representatives directed its attention

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[7] Virginia Declaration of Rights, Art. 10 (1776), *reprinted in* 1 Schwartz, *The Bill Of Rights: A Documentary History* 235 (1971) (hereinafter cited as "Schwartz").

[8] Pennsylvania Declaration of Rights, Art. X (1776) (Schwartz 265).

[9] Delaware Declaration of Rights, § 17 (1776) (Schwartz 278).

[10] Maryland Declaration of Rights, Art. XXIII (1776) (Schwartz 282).

[11] North Carolina Declaration of Rights, Art. XI (1776) (Schwartz 287).

[12] Vermont Declaration of Rights, Art. XI (1777) (Schwartz 323).

[13] Massachusetts Declaration of Rights, Pt. I, Art. XIV (1780) (Schwartz 342).

[14] New Hampshire Bill of Rights, Art. XIX (1783) (Schwartz 377-378).

solely to the problem of general warrants (1 Annals of Congress 438 (1789)):

> The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.[15]

Accordingly, the original draft of the Fourth Amendment, as revised in minor, stylistic particulars by the Committee of Eleven, reflected the understanding that it was to be aimed specifically and solely against the use of certain sorts of warrants. It provided (1 Cong. Deb. 783 (Gales and Seaton ed. 1834)):

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

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[15] In a letter to George Eve a few months earlier, Madison had written (1 *Letters and Other Writings of James Madison* 447 (1865)):

> [I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants, &c.

An amendment was then proposed by Representative Benson of New York (*ibid.*):

> Mr. Benson objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read "and no warrant shall issue."
>
> The question was put on this motion, and lost by a considerable majority.

As described by Lasson, *supra,* at 101-102, however, the Benson version was eventually adopted, it seems, by oversight (footnotes omitted; emphasis in original):

> [O]n August 24, when Benson as chairman of a Committee of Three, which had been appointed to arrange the amendments, reported an arrangement of the amendments as they were supposed to have been agreed upon by the House, the *clause appeared as he had proposed it and as the House had rejected it.*
>
> And so it stands today. The records do not show that the alteration was ever noticed or assented to as such by the House. In this form it was received and agreed to by the Senate. And the only remaining discussion by the House and Senate concerned those amendments upon which the two houses were not in accord.

See also Fraenkel, *supra,* 34 Harv. L. Rev. at 366, n. 30; Landynski, *supra,* at 41-42.

The language of the Fourth Amendment as eventually ratified plainly affords protection against both unreasonable searches and seizures *and* general or otherwise defective warrants. But this background strongly suggests that the Framers intended no change in the then-settled rule that not every warrantless search was *per se* unreasonable. Although the Framers had focused their attention on the

search of the home and had assumed that an intrusion into that area would not be lawful except if undertaken pursuant to a warrant meeting the constitutional requirements, there is no hint in the historical materials that other warrantless searches were considered equally repugnant or were to be measured by the same exacting standard. Indeed, as we develop below, see pp. 41-43, *infra,* quite the contrary may be inferred from legislation enacted by the very Congress that drafted the Bill of Rights, and by other early Congresses, which countenanced warrantless searches outside the sanctity of the dwelling.

3. *This Court has repeatedly acknowledged the distinction between warrantless searches of the home and of areas of lesser expectation of privacy*

Our contention that a warrant is an essential ingredient of reasonableness under the Fourth Amendment only when the conduct of law enforcement officers touches on interests that implicate "the essential purpose of the Fourth Amendment" (*Jones* v. *United States,* 357 U.S. 493, 498) is one that finds substantial support in the decisions of this Court. Although the Court has cautioned that "the Fourth Amendment protects people, not places" (*Katz* v. *United States, supra,* 389 U.S. at 351), it has always recognized that some places are more personal—are more directly linked to the need for individual privacy—and hence more deserving of Fourth Amendment protection than are others.

The home more than any other place satisfies the individual's need for a sanctuary from which the public eye and, insofar as reasonable, the public authority can be excluded except under the most compelling justifications and safeguards. This is not only because as a historical matter, as noted above, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" (*United States* v. *United States District*

Court, supra, 407 U.S. at 313), but also because "[a]t the very core [of personal privacy] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States,* 365 U.S. 505, 511. It is for this reason that "over the years the Court consistently has been the most protective of the privacy of the dwelling" (*Wyman* v. *James,* 400 U.S. 309, 316) and has afforded "the sanctity of private dwellings • • • the most stringent Fourth Amendment protection" (*United States* v. *Martinez-Fuerte,* No. 74-1560, decided July 6, 1976, slip op. 17-18).

In addition to the home and other structures such as an office [16] or hotel room,[17] private communications have received maximum protection from governmental search or seizure. Again, this determination has rested both on the historical underpinnings of the Fourth Amendment—"[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression" (*Marcus* v. *Search Warrant,* 367 U.S. 717, 729)—and on the practical realization of the considerable expectation of privacy placed on conversations held in private and the intrinsic societal importance of satisfying that expectation. See, *e.g., United States* v. *United States District Court, supra; Katz* v. *United States, supra; Berger* v. *New York,* 388 U.S. 41.[18] Similarly, and for even more

[16] *G. M. Leasing Corp.* v. *United States,* No. 75-235, decided January 12, 1977; *Mancusi* v. *DeForte,* 392 U.S. 364; *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385.

[17] *Stoner* v. *California,* 376 U.S. 483; *United States* v. *Jeffers,* 342 U.S. 48; *Johnson* v. *United States,* 333 U.S. 10.

[18] Because there is "no difference [in the expectation of privacy] between the sealed letter and the private telephone message" (*Olmstead* v. *United States,* 277 U.S. 438, 475; Brandeis, J., dissenting), the protections accorded private communications do not diminish when the communication is in a sealed container away from a person's premises. Thus, first-class domestic letters receive the same Fourth Amendment safeguards "as if they were retained by the parties forwarding them in their own domiciles." *Ex parte Jackson,* 96 U.S. 727, 733. See *United States* v. *Van Leeuwen,* 397 U.S. 249.

obvious reasons, intrusions into a person's body (except, perhaps, at the border) have required both probable cause and, in the absence of exigent circumstances, a warrant. See *Schmerber* v. *California,* 384 U.S. 757, 770.

An appreciation of the unique position occupied by the home and these other high privacy areas explains the Court's consistent application of the accepted rule that "a search of private houses is presumptively unreasonable if conducted without a warrant" (*See* v. *City of Seattle,* 387 U.S. 541, 543), subject only to "'a few specifically established • • • situations' [in which] a warrantless search of a dwelling [may] withstand constitutional scrutiny." *Vale* v. *Louisiana,* 399 U.S. 30, 34. Because of the substantial privacy invasion inevitably occasioned by such searches, it is reasonable to insist both that the justification for the intrusion be strong—*i.e.,* that there be probable cause to believe that the object to be seized will be found in the area to be searched—and that the probable cause determination be made in advance by a neutral and detached magistrate.

Advance judicial approval in these contexts makes a significant contribution to the values protected by the Fourth Amendment. Not only does resort to a warrant ensure that unjustified searches and seizures—with their consequent impairment of "core" privacy expectations—will not occur, but it also limits the scope of the officer's discretion by "particularly describing the place to be

searched, and the persons or things to be seized." As the Court observed in *Camara* v. *Municipal Court*, 387 U.S. 523, 532:

> [W]hen [an] inspector [without a warrant] demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.

A warrant provides assurance to the occupant of a home on each of these scores. See *G. M. Leasing Corp.* v. *United States*, No. 75-235, decided January 12, 1977, slip op. 18; *United States* v. *Martinez-Fuerte*, *supra*, slip op. 21. By the same token, in the interception of wire or oral communications, another context in which the warrant requirement is unequivocally imposed, the possibility of "rummaging" by law enforcement officers is equally real and the benefits to the individual from an officer's resort to a warrant equally substantial. Cf. 18 U.S.C. 2518(4) and (5).

In these high privacy areas, then, prior resort to a magistrate has an important role to play, and it is constitutionally unreasonable for law enforcement officers to search and seize without a warrant if one could have been obtained. We recognize, however, that on several occasions the Court has articulated the constitutional preference for a warrant and the presumptive unreasonableness of a warrantless search in broader terms. In *Katz* v. *United States*, *supra*, 389 U.S. at 357, for example, the Court stated:

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States*, 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ." *Wong Sun* v. *United States*, 371 U.S. 471, 481-482. "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. [Footnotes omitted.]

Despite this unqualified statement, the Court to our knowledge has never invalidated a search, based upon probable cause and otherwise reasonable, because it was undertaken without a warrant, except in an area of "core" privacy such as the dwelling or private communication.[19]

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[19] The cases cited in support of the *per se* rule in *Katz* (389 U.S. at 357, n. 18) were (1) *Jones* v. *United States*, *supra*, 357 U.S. at 498, which held that if "federal officers [were] free to search without a warrant merely upon probable cause to believe that certain articles were *within a home*, the provisions of the Fourth Amendment would become empty phrases" (emphasis added); (2) *Chapman* v. *United States*, 365 U.S. 610, which held that a landlord could not authorize the warrantless entry into the *apartment* of his tenant; (3) *Stoner* v. *California*, *supra*, 376 U.S. at 490, which held that "[n]o less than a tenant of a house, or occupant of a room in a boarding house * * *, a guest in a hotel room is entitled to [the] * * * protection against unreasonable searches and seizures." A fourth case, *Rios* v. *United States*, 364 U.S. 253, involved a search and seizure of narcotics from a defendant who had been riding in a taxicab, where there was neither a warrant *nor* any showing of probable cause to justify the entry into the vehicle. *Id.* at 261.

The Court's other recent expressions of this rule have included (a) the plurality opinion in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 454-455, which relied on *Katz* v. *United States*, *supra* (private communication); *Jones* v. *United States*, *supra* (home); *McDonald* v. *United States*, 335 U.S. 451 (rooming house); and *United States* v. *Jeffers*, *supra* (hotel room); (b) *Cady* v. *Dombrowski*, 413 U.S. 433, 439, which

Indeed, in the one area of lesser privacy expectations that has precipitated the most abundant Fourth Amendment litigation—the search of automobiles and other movable vehicles—the Court has expressly declined to equate the reasonableness of a search with the opportunity to

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relied on *Camara* v. *Municipal Court, supra* (apartment) and *Coolidge* v. *New Hampshire, supra*; and (c) *G. M. Leasing Corp.* v. *United States, supra*, slip op. 13-14, which involved a warrantless search of business premises and relied on *Camara* v. *Municipal Court, supra; Coolidge* v. *New Hamphire, supra; Stoner* v. *California, supra; United States* v. *Jeffers, supra; McDonald* v. *United States, supra;* and *Agnello* v. *United States*, 269 U.S. 20 (home).

Although *Coolidge* may be read as having extended the *per se* rule to the search of a chattel (*i.e.*, an automobile), the emphasis in *Coolidge* was upon the fact that the automobile was parked adjacent to the defendant's home and could only be seized by "entering [his] private property" (403 U.S. at 463, n. 20). Part II-D of the opinion in *Coolidge*—the only relevant portion of the opinion that commanded a majority of the Court—is based on "[t]he most common situation in which Fourth Amendment issues have arisen," namely, those "in which the police enter the suspect's *premises*, arrest him, and then carry out a warrantless search and seizure of evidence" (*id.* at 475; emphasis added). The thrust of that part of the opinion is devoted to answering the argument "that warrantless entry [onto a person's premises] for purposes of arrest and warrantless seizure and search of automobiles are *per se* reasonable, so long as the police have probable cause" (*id.* at 479). See also *id.* at 480. Mr. Justice Harlan, who cast the deciding vote in *Coolidge*, likewise viewed the case as involving "such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of [an offense]" (*id.* at 490), and the same emphasis on the entry onto the defendant's premises is also to be found in that portion of the opinion that did not command a majority of the Court. See, *e.g.*, *id.* at 461, n. 18.

Subsequent cases have expressly distinguished *Coolidge* on the ground that the search and seizure in that case was of an automobile "parked adjacent to the dwelling place of the owner" (*Cady* v. *Dombrowski, supra*, 413 U.S. at 446-447) and that "the seizure of that automobile required an entry upon private property." *Cardwell* v. *Lewis*, 417 U.S. 583, 593.

obtain a warrant.[20] Ever since Chief Justice Taft, writing for the Court in *Carroll* v. *United States*, 267 U.S. 132, 149, stated "the true rule [to be] that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid," the Court has consistently upheld the constitutionality of a probable cause search of a vehicle seized in a public place.[21]

The rationale for the Court's disparate treatment of automobiles and houses does not rest exclusively on the fact that vehicles are mobile and dwellings are not. While this factor may frequently excuse the warrantless *seizure* of a car under the "emergency" exception to the warrant requirement, it is analytically an insufficient justification for the subsequent *search* of the car without prior judicial approval.[22] The answer that the Court has provided why "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would

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[20] Motor vehicles are "effects" within the meaning of the Fourth Amendment. *Cady* v. *Dombrowski, supra*, 413 U.S. at 439.

[21] See, *e.g.*, *Husty* v. *United States*, 282 U.S. 694; *Scher* v. *United States*, 305 U.S. 251; *Brinegar* v. *United States*, 338 U.S. 160; *Chambers* v. *Maroney*, 399 U.S. 42; *Cady* v. *Dombrowski, supra*; *Cardwell* v. *Lewis, supra*; *Texas* v. *White*, 423 U.S. 67.

[22] The Court has recognized this. "Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former * * *, warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed was remote, if not non-existent." *Cady* v. *Dombrowski, supra*, 413 U.S. at 441-442.

not" is "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *South Dakota* v. *Opperman, supra,* slip op. 3.[23] "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis, supra,* 417 U.S. at 590.

In *Chambers* v. *Maroney, supra,* for example, the police acquired probable cause to believe that persons driving a particular car had robbed a service station. They spotted and stopped the car, arrested its occupants, and drove the car to the station house, where they thoroughly searched it and found handguns and other evidence of the robbery. The Court upheld the warrantless search of the car even though, once the car had been seized, there were no exigent circumstances precluding the procurement of a warrant prior to the search. Citing the line of cases beginning with *Carroll* v. *United States, supra,* the Court began by stating that "[i]n terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office" (399 U.S. at 48) and that "automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize" (*ibid.*). The Court then considered whether a distinction should be drawn between the warrantless seizure of the automobile and the ensuing warrantless search (*id.* at 51-52):

> Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained;

[23] See also *United States* v. *Martinez-Fuerte, supra,* slip op. 17-18; *United States* v. *Ortiz,* 422 U.S. 891, 896, n. 2.

> arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The Court warned, however, that the "same consequences may not follow where there is unforeseeable cause to search a house" because "as *Carroll, supra,* held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars" (*id.* at 52).

4. *For purposes of the warrant requirement, there is no persuasive reason to distinguish between automobiles and other movable chattels that have been validly seized in public*

The same "constitutional difference" between houses and cars, resting as it does on the significantly disparate expectations of privacy in these areas, applies as well between houses and chattels other than automobiles. One's reasonable expectation of privacy in baggage such as the footlocker in this case is not appreciably greater than that in a vehicle. Footlockers and other baggage carry only a fraction of a person's possessions and rarely contain personal papers. Indeed, there is virtually no meaningful distinction between such containers and the enclosed areas of an automobile, such as a glove compartment or a trunk, which frequently serve as the temporary repository of personal effects but which may nonetheless be searched without a warrant after they have been lawfully seized, if probable

cause exists. See, *e.g.*, *Texas* v. *White*, 423 U.S. 67, 68 (front seat console);[24] *Cady* v. *Dombrowski*, 413 U.S. 433, 437 (locked trunk); *Scher* v. *United States*, 305 U.S. 251, 253 (locked trunk); *Chambers* v. *Maroney*, *supra*, 399 U.S. at 44 (glove compartment). Moreover, a footlocker, unlike an automobile, is arguably less deserving of privacy protection, since, as here, possession is frequently surrendered to a common carrier with the consequent risk that it will be opened. See *United States* v. *Bronstein*, 521 F. 2d 459, 465 (C.A. 2) (Mansfield, J., concurring), certiorari denied, 424 U.S. 918.[25]

Furthermore, objects such as the footlocker are, like vehicles, easily movable, so that their warrantless seizure, on probable cause, will almost always be justified. The rationale of the "automobile search" exception, as previously noted, is that "the intrusion involved in initially seizing a car on the highway and holding it for the short time required to seek a warrant is so substantial as to be constitutionally indistinguishable from the intrusion involved in a search of the vehicle." *Texas* v. *White*, *supra*, 423 U.S. at 71 (Marshall, J., dissenting). The same may be said of the search of a footlocker or suitcase that has been validly seized. Certainly the seizure of the container is a substantial interference with the owner's rights to

[24] The search of the car in *White* occurred after the police had observed the driver "making a hand movement toward the glove compartment, and then toward the seat as though attempting to 'stuff' something between the seats." *White* v. *State*, 521 S.W. 2d 255, 256 (Tex. Ct. Crim. App.). The evidence introduced against the defendant was found "stuffed between the fold-down console and the front seat of the car." *Ibid.*

[25] Indeed, common carriers by tariff often reserve the right to inspect freight that they are given to transport. See, *e.g.*, Uniform Freight Classification 12, I.C.C. 8, Rule 2, § 2 (railroads); National Motor Freight Classification, I.C.C. NMF 100-C, Item No. 360, § 3 (motor carriers).

unfettered possession and use of its contents; yet even under the court of appeals' view he may be denied access to it for as long as the officers need to obtain a warrant (Pet. App. 19a). As in *Chambers*, once that intrusion has been sanctioned, calculations of "greater" or "lesser" intrusions will not be demanded; either the immediate search of the chattel or its immobilization until a warrant can be obtained is reasonable under the Fourth Amendment.[26] See also *United States* v. *Edwards*, *supra*, 415 U.S. at 805.

The court of appeals conceded that "baggage or goods in transit present some of the same characteristics as automobiles. Unless immobilized, such items may disappear before a warrant is obtained and immobilization (a step which most courts, including ourselves, will permit, given cause), is arguably just as annoying to the owner as a search" (Pet. App. 17a). The court nevertheless refused to follow the reasoning of *Chambers* to its conclusion so as to approve the search of respondents' footlocker as reasonable. It observed that "[b]aggage predated automobiles, yet *Carroll* and its progeny do not mention baggage as a separate category comparable to vehicles" (*ibid.*). And it was concerned that an extension of the *Chambers* rationale to baggage "could have considerable impact, as [the] premises [of that argument] might seem to apply not only to baggage but to mail, express packages, and moving freight of all description" (*id.* at 18a). The court concluded,

[26] It is frequently to the owner's benefit that an immediate search of the chattel occur if law enforcement officers have probable cause to believe it contains contraband or other evidence of a crime. Because probable cause is established when there exists a reasonable and supportable suspicion of crime that may fall far short of certainty, often there will be probable cause to search containers carrying nothing incriminating. A warrantless search at the moment of seizure may vindicate the owner and avoid unnecessary disruption of his activities.

in short, that there is a difference of constitutional dimensions between the search of one type of movable container that has been validly seized in public upon probable cause (an automobile) and the search of another (baggage or packages).

In our view, neither history nor logic supports such a distinction. To begin with, it is not remarkable that *Carroll* and subsequent cases[27] "do not mention baggage as a separate category comparable to vehicles." Since each of those decisions involved the search of a motor vehicle, the Court had no occasion to discuss the search of baggage independent of the automobile.[28] But at the same time the Court's discussion in *Carroll* implicitly affords strong support for the contention that its reasoning is not limited to vehicles.

The decision in *Carroll* was predicated upon a lengthy review of congressional statutes and court decisions interpreting them, which indicated that, "practically since the

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[27] See n. 21, *supra*.

[28] The lower courts, however, have repeatedly upheld the authority of police to open a footlocker or other container removed from an automobile that had been seized on probable cause. See *e.g.*, *United States* v. *Soriano*, 497 F. 2d 147 (C.A. 5) (*en banc*), pending on petition for a writ of certiorari, No. 76-5143; *United States* v. *Issod*, 508 F. 2d 990 (C.A. 7), certiorari denied, 421 U.S. 916; *United States* v. *Evans*, 481 F. 2d 990 (C.A. 9). Indeed, the court below apparently would have upheld the search here under the "automobile exception" if the agents had waited to make the arrests until after respondents had placed the trunk into the automobile and had started the motor. "Under the circumstances" of the case, however, the court of appeals felt compelled to agree with the district court that "the floor of the automobile was nothing more than a platform or resting place for the footlocker" (Pet. App. 10a, 48a). For purposes of rational Fourth Amendment analysis, we can see no constitutional difference between the validity of a search of a footlocker taken from an automobile and of one lawfully seized on a public street.

beginning of the Government," there has been recognized "a necessary difference" (267 U.S. at 153) between the search of houses and similar structures and the search of "goods in the course of transportation" (*id.* at 149-151):

> It is noteworthy that the twenty-fourth section of the Act of 1789 [1 Stat. 29, 43] provides:
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> "That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall haye cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured, shall be forfeited."
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> Again, by the second session of the Act of March 3, 1815, 3 Stat. 231, 232, it was made lawful for customs officials not only to board and search vessels within their own and adjoining districts, but also to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty or had been introduced into the United States in any manner contrary to law, whether by the person in charge of the vehicle or beast or otherwise, and if they should find any goods, wares or merchandise thereon, which they had probable cause to believe had been unlawfully brought into the

country, to seize and secure the same, and the vehicle or beast as well, for trial and for forfeiture.[29]

See also Lasson, *supra,* at 125. As the Court noted in *Carroll* (267 U.S. at 152), this Act expired after two years but was later revived and reenacted as Section 3 of the Act of July 18, 1866, 14 Stat. 178, which provided in part:

> That any of [certain authorized officers or other persons] may stop, search, and examine, • • • any vehicle, beast, or person on which or whom he or they shall suspect there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law, • • • and to search *any trunk or envelope,* wherever found, in which he may have a reasonable cause to suspect there are goods which were imported contrary to law; and if any such officer or other person so authorized as aforesaid shall find any goods, wares, or merchandise, on or about any such vehicle, beast, or person, *or in any such trunk or envelope,* which he shall have reasonable cause to believe are subject to duty, or to have been unlawfully introduced into the United States, • • • he shall seize and secure the same for trial • • • [Emphasis added.][30]

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[29] Morover, the Act of March 3, 1815, 3 Stat. 232, contained the following proviso in Section 2:

> *Provided always,* That the necessity of a search warrant, arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart, sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation or *to packages* on any animal or animals, or carried by man on foot. [Emphasis added.]

The President who signed the 1815 statute into law was, of course, James Madison, who had proposed the language that eventually became the Fourth Amendment. Lasson, *supra,* at 100.

[30] This section, which later became Rev. Stat. § 3061, is now 19 U.S.C. 482.

The significance of these statutes is readily apparent. The First Congress, many of whose members had only a few years earlier railed against the "hated writs of assistance," which "had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws" (*Stanford* v. *Texas, supra,* 379 U.S. at 481), nevertheless clearly authorized American officials to seize and search uncustomed goods on reason to suspect their existence; only when the search and seizure occurred in a "dwelling-house, store, building, or other place" out of the public view was a warrant required. And of equal importance is the fact that the statutes relied on in *Carroll* as having recognized a "constitutional difference between houses and cars" (*Chambers* v. *Maroney, supra,* 399 U.S. at 52) dealt in precisely the same fashion with other movable containers or packages. Each could contain articles that the police were entitled to seize, and each was potentially removable from police control before a warrant could be obtained; therefore, so long as the officers had sufficient justification for the intrusion, each was subject to search without a warrant. As the Court has since observed, "[c]ommon sense dictates • • • that questions involving searches of motorcars *or other things readily moved* cannot be treated as identical to questions arising out of searches of fixed structures like houses." *Preston* v. *United States,* 376 U.S. 364, 366 (emphasis added).

Nor is there substance to the First Circuit's objection that to permit a warrantless search of baggage such as a footlocker upon probable cause would inevitably lead to similar searches of "mail, express packages, and moving freight of all description" (Pet. App. 18a). We have already noted (see p. 30 and note 18, *supra*) that both historical considerations related to a central purpose underlying the adoption of the Fourth Amendment—the protection of a

person's papers from indiscriminate searches—and the strong expectation of privacy in private communications justify a presumptive warrant requirement before domestic first-class mail may be opened.[31] The rule that we urge for baggage and other movable containers not possessing such high-privacy characteristics would not affect that requirement. As to "express packages, and moving freight of all description," it is difficult to understand why a rule permitting the probable cause search of baggage lawfully seized in a public place is made less reasonable because it arguably would allow the search of these other, similar types of containers. Indeed, a substantial portion of the "freight" that law enforcement officers encounter in transit deserves less stringent Fourth Amendment protection than baggage, since the owner's privacy interest in such goods (which he may never have seen) is generally considerably subordinate to his proprietary interest in them—his concern that they arrive safely—and he may have described their contents on the outside of the package both as an advertisement and as an aid in ensuring their proper handling.

Finally, the warrantless, probable cause search of personal belongings outside the home is reasonable because it creates little risk of those abuses that the Warrant Clause was designed to prevent. Of prime importance is the fact that each such search must be justified by facts sufficient to warrant a man of prudence and caution to believe that the chattel contains contraband or the instrumentalities or evidence of a criminal offense. This is a stringent require-

[31] Domestic first-class mail also has statutory protection from search without a warrant. 39 U.S.C. 3623(d). The amenability of international mail to warrantless search at the border stands on a different historical and legal footing, the precise contours of which are presently before the Court in *United States* v. *Ramsey*, No. 76-167, certiorari granted, October 4, 1976.

ment and one whose satisfaction the officer may eventually have to demonstrate in court.[32] Moreover, there is little opportunity in such searches for the type of wide-ranging, indiscriminate rummaging through possessions that a search of a house or office or of communications may entail and that the warrant historically was designed to prevent. See *Marron* v. *United States*, 275 U.S. 192, 196. The scope of the search is necessarily limited by the size and contours of a relatively small container and by the number of items that can be enclosed therein. A person can exercise substantial control over both the kinds of belongings that he subjects to search in public and the frequency with which the police will encounter them; a dwelling, on the other hand, is always subject to search (within reasonable time limits) when the police have reason to believe that it harbors criminal activity or evidence. Most importantly, perhaps, a search of chattels outside the home may only occur after the police have properly seized them without a warrant and denied the owner access to them—a risk that a person necessarily accepts when he transports the chattel in public and that further diminishes his reasonable expectation of privacy.

In sum, if this case involved the warrantless search of an automobile that had been lawfully seized in South Station on probable cause to believe that it contained a controlled substance, the outcome would not be in doubt. We

[32] Evidence seized on less than probable cause will be excluded at trial, and a police officer's determination of probable cause is scrutinized with greater care when a warrant has not been obtained. *United States* v. *Watson*, *supra*, 423 U.S. at 423; *United States* v. *Ventresca*, 380 U.S. 102, 106; *Aguilar* v. *Texas*, 378 U.S. 108, 111. Even if no incriminating evidence is found, an officer who acts without probable cause may be forced to answer in damages. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388; *Monroe* v. *Pape*, 365 U.S. 167.

submit that no different result is required because the agents searched a footlocker rather than a vehicle. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears" (*Coolidge* v. *New Hampshire, supra,* 403 U.S. at 461-462), and the Court's decisions upholding warrantless automobile searches have therefore been grounded in broader principles that are equally applicable here.

B. Even if the Court were to adopt a presumptive rule in favor of warrants, the search of the footlocker was reasonable

Our discussion thus far has sought to demonstrate that the search of a footlocker that has been lawfully seized in a public place upon probable cause to believe that it contains evidence of a crime is not unreasonable under the Fourth Amendment simply because accomplished in the absence of a warrant. Application of this principle would require a reversal of the court of appeals' judgment, since both lower courts found (Pet. App. 8a, 45a), and respondents have never seriously contested, that the agents had probable cause to believe that the footlocker contained marijuana and that the agents could therefore properly immobilize it until a search could take place. But regardless of whether the Court adopts this contention, two additional factors present in this case contribute to the lawfulness of the warrantless search of the footlocker: the agents' belief that the footlocker contained contraband, and respondents' arrests at the time of the seizure.

1. ***The agents could lawfully seize and search the footlocker without a warrant on probable cause to believe that it contained contraband***

The agents had probable cause to believe that the footlocker contained not personal belongings or papers, but contraband.[33] Statutes dating almost from the time of adoption of the Fourth Amendment have authorized warrantless searches of packages for "contraband goods in the course of transportation and subject to forfeiture or destruction." *Carroll* v. *United States, supra,* 267 U.S. at 149. Contraband is material whose very possession the law proscribes and to whose possession "the government is entitled * * *." *Id.* at 149, quoting from *Boyd* v. *United States, supra,* 116 U.S. at 623.

In relying upon the fact that the footlocker contained contraband, we are not attempting to resurrect the distinction between such items and "mere evidence," a distinction that was put to rest by *Warden* v. *Hayden,* 387 U.S. 294. The Fourth Amendment does not turn upon whether the government has a stronger property interest in the seized goods than does the person claiming to be aggrieved by the seizure. *Id.* at 307. But the reasonableness requirement of the Fourth Amendment does depend upon the strength of a person's privacy interest in the area invaded by the search, and it is significant that a person can have no reasonable expectation of privacy in contraband goods. Indeed, in assessing the reasonableness of the warrantless search in *Coolidge* v. *New Hampshire, supra,* the plurality

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[33] The agents could reasonably have believed that the footlocker contained nothing but contraband. Not only was the trunk of an unusual weight for its size, but also a dog trained to detect controlled substances had reacted positively to the footlocker and the footlocker was leaking talcum powder, which is commonly used to conceal the odor of such substances. It is unlikely that one would pack a large quantity of loose talcum powder in a container carrying personal effects. Respondents also had several suitcases in their possession, which was a further clue that the footlocker did not carry personal effects.

opinion several times emphasized that the object of the search was not "contraband or stolen goods." 403 U.S. at 472. See also *id.* at 462.

Moreover, since the presence of the contraband subjected the footlocker to a warrantless seizure and forfeiture, it was reasonable for the agents to conduct a search of the chattel in their lawful possession. In *Cooper* v. *California,* 386 U.S. 58, state police arrested the defendant in connection with a narcotics offense and impounded the automobile he was driving, pursuant to a state statute requiring the seizure of any "vehicle used to store, conceal, transport, sell or facilitate the possession of narcotics, such vehicle 'to be *held as evidence* until a forfeiture has been declared or a release ordered'" (*id.* at 60). One week later police officers searched the car without a warrant and found incriminating evidence in the glove compartment. In affirming the defendant's conviction despite the use of the evidence at trial, the Court held that the search had been reasonable (*id.* at 61):

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had "legal title" to it or not—was closely related to the reason petitioner was arrested, the reason his car was impounded, and the reason it was being retained.

Here, too, the seizure of the footlocker was pursuant to a statute that required its forfeiture. 21 U.S.C. 881 represents the judgment by Congress that not only automobiles and other conveyances (21 U.S.C. 881(a)(4)) but also "container[s]" of all kinds (21 U.S.C. 881(a)(3)) are an indispensable tool of illicit narcotics traffic and are therefore subject to seizure upon probable cause (21 U.S.C. 881 (b)(4)) and forfeiture to the government (21 U.S.C. 881 (b)(3)). The court of appeals agreed that Section 881(b) "reinforces the agents' power to detain baggage at least temporarily" (Pet. App. 19a and n. 9). But if agents may seize such containers and "treat [them] as if [they] were their own" (*Cady* v. *Dombrowski, supra,* 413 U.S. at 453; Brennan, J., dissenting), a search of their contents is reasonable "as an integral part of their right of retention" (*ibid.*). See *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 464, n. 21; *United States* v. *Edwards,* 415 U.S. 800, 807.[34]

2. *A warrant was unnecessary to search the footlocker, since it had been seized on probable cause at the time of and in connection with respondents' arrests*

The seizure of the footlocker occurred contemporaneously with respondents' arrests, and the search took place as soon thereafter as was practicable.[35] In *United States* v. *Watson, supra,* the Court reaffirmed that the police may carry out a warrantless arrest in a public place upon probable cause to believe that a crime has been or is being committed by the person arrested. The Court upheld this authority, sanctioned both by history and the necessities of law enforcement, despite the observation of Mr. Justice

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[34] See also *United States* v. *Zaicek,* 519 F. 2d 412, 414-415 (C.A. 2); *United States* v. *Dinapoli,* 519 F. 2d 104, 106 (C.A. 6); *United States* v. *Francolino,* 367 F. 2d 1013, 1018-1022 (C.A. 2) (Friendly, J.), certiorari denied, 386 U.S. 960.

[35] The footlocker was opened at the federal building within 90 minutes of respondents' arrests. According to the arresting agent, the search was delayed because "there was considerable pedestrian traffic, motor vehicle traffic [at South Station], and it was dark on the street corner—not well lit for purposes of observation, anyway" (A. 50). Ths short delay does not affect the legality of the search. See *United States* v. *Edwards, supra,* 415 U.S. at 803; *Abel* v. *United States,* 362 U.S. 217, 239.

Powell (423 U.S. at 428) that "as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater [than those on the search of private places]. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent."

Once a valid arrest has occurred, a warrantless search of the arrestee and of his surrounding area, incident to the arrest, has always been regarded as reasonable. Weighed against the "annoyance and temporary inconvenience" of the search is, first of all, the need of the arresting officers to protect themselves against use of any weapon that the arrestee may have in his possession. Equally imperative is the need to secure evidence of his crime that could be destroyed unless immediately discovered. And a quick search of the arrestee and his possessions may disclose leads to the involvement of other persons in the crime—leads that might prove fruitless if the arrestee or others were to alert his confederates while the police obtained a warrant.

While the validity of the search of a person incident to a lawful arrest "has been regarded as settled from its first enunciation" (*United States* v. *Robinson*, 414 U.S. 218, 224),[36] the search of an arrestee's surrounding area "has been subject to differing interpretations as to the extent of the area which may be searched" (*ibid.*). After a series of

[36] "There is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." Taylor, *supra*, at 28.

often-irreconcilable holdings,[37] the Court concluded in *Chimel* v. *California*, 395 U.S. 752, that a warrantless search incident to an arrest was reasonable only if confined to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

Although the court of appeals recognized the need to permit the agents to conduct a thorough search of respondents and their belongings at the time of their arrest, it held that the search of the footlocker could not be justified on that basis because it was not within respondents' "immediate control." This conclusion, we submit, unduly restricts the search incident to arrest exception to the warrant requirement and incorrectly applies the holding of *Chimel* to a type of search that that case, and the decisions that preceded it, did not involve and should not be construed to encompass—namely, a search outside the home or office, where the police have probable cause both to arrest a person *and* to search the property in his possession for evidence of a crime. In such circumstances, the search creates no appreciable risk of the kind of abuse against which *Chimel* was directed. Here, unlike the normal "incidental search," which is justified solely by the fact of arrest, the agents had probable cause to believe that the footlocker contained contraband. In view of this strong, specific justification for the search and the severely weakened privacy interests of the person under arrest, it was reasonable for the agents to

[37] See, *e.g.*, *Marron* v. *United States*, *supra*; *Go-Bart Importing Co.* v. *United States*, *supra*; *United States* v. *Lefkowitz*, 285 U.S. 452; *Harris* v. *United States*, *supra*; *Trupiano* v. *United States*, 334 U.S. 699; *United States* v. *Rabinowitz*, 339 U.S. 56; *Abel* v. *United States*, *supra*; *Ker* v. *California*, 374 U.S. 23.

undertake the search without the additional protections accorded by prior resort to a magistrate.

Chimel arose against the background of what the Court perceived to be an effort by law enforcement officers to use arrests on private property as little more than a pretext for the kind of free-handed and unrestricted search of premises that the Framers had condemned in adopting the Warrant Clause. As Mr. Justice Stewart observed in *Chimel* (395 U.S. at 767), the Court's decisions upholding such searches had given "law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere." This practice, the Court noted, had been correctly characterized by Judge Learned Hand's remark in *United States* v. *Kirschenblatt*, 16 F. 2d 202, 203 (C.A. 2), that "[a]fter arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant * * *." *Chimel* sought to end once and for all such warrantless, unjustified "top-to-bottom search[es] of a man's house" (395 U.S. at 766-767, n. 12).[38]

Thus, *Chimel* condemned searches that bore no intrinsic relationship to the underlying arrest but rather employed the arrest as a means to bypass both the requirement of probable cause and (because a "core" privacy area was

[38] *Chimel* involved a wide-ranging search of each of the rooms of the arrestee's home (395 U.S. at 754). In addition, each of the search incident to arrest cases disapproved or questioned in *Chimel* concerned a search for which a warrant would otherwise have been required. See *Marron* v. *United States*, *supra* (apartment); *Harris* v. *United States*, *supra* (apartment); *United States* v. *Rabinowitz*, *supra* (office).

implicated) the need for a warrant.[39] In such circumstances, because of the minimal justification for the search of the arrestee's surrounding area and the important privacy interests invaded by the intrusion, it was imperative that the scope of the search be limited to the extent "commensurate with the rationale that excepts the search from the warrant requirement." *Cupp* v. *Murphy*, 412 U.S. 291, 295.

These considerations are wholly inapposite here for a number of reasons. Contrary to the court of appeals' assumption (Pet. App. 11a-13a), searches incident to arrest are not merely an exception to the warrant requirement. They are also an exception to the probable cause requirement. Such searches do not depend for their justification upon a police officer's reasonable belief that a particular suspect is carrying a weapon or evidence of the crime for which he has been arrested. Rather, they are sanctioned by the arrest itself. *United States* v. *Robinson*, *supra*, 414 U.S. at 235. This being so, it is reasonable to restrict the scope of such non-probable-cause searches to those areas in which weapons could be procured or evidence could be destroyed if not seized at once—in other words, it is important, as a protection of Fourth Amendment interests, to restrict the search so that it is no wider than its sole articulated justification.

When a search following an arrest is supported by a wholly different justification—probable cause to believe that evidence of a crime will be found—the same restriction

[39] The First Circuit had previously perceived the import of *Chimel* in *United States* v. *DeLeo*, 422 F. 2d 487, 492, certiorari denied, 397 U.S. 1037: "We read *Chimel* as being acutely concerned about the increasing legitimation of wide-ranging warrantless searches of lodgings and buildings based on the fortuity of arrests on the premises * * *."

does not follow. In such circumstances the independent justification prevents searches of areas based entirely on the fortuity of the locus of the arrest and provides a built-in limitation on the places and things that may be searched. There is thus no equally compelling reason to limit the search solely to those areas within the arrestee's immediate control, since the search is designed to uncover evidence that there is a strong reason to believe will be found, not merely to prevent the destruction of evidence that may or may not exist.[40]

Furthermore, as noted above, *Chimel* involved the search

[40] The court of appeals' insistence that belongings be in the "immediate control" of the person arrested, even when probable cause for a search of the baggage exists and the search occurs in a public place thus confuses two distinct sets of Fourth Amendment principles and turns the Amendment's protection on its head. A person is more likely to have personal papers and objects on his person or in a small hand-carried container such as a briefcase, suitcase or handbag than in a footlocker. Yet despite the greater expectation of privacy in the contents of these containers, lower courts, including the First Circuit, have upheld their warrantless search even in circumstances where the arrestee has been handcuffed and the chattel effectively removed from his control. See, *e.g.*, *United States* v. *Schleis*, 543 F. 2d 59 (C.A. 8), pending on petition for a writ of certiorari, No. 76-5722. *United States* v. *Giles*, 536 F. 2d 136 (C.A. 6); *United States* v. *Edmonds*, 535 F. 2d 714 (C.A. 2); *United States* v. *Eatherton*, *supra*; *United States* v. *Battle*, 510 F. 2d 776 (C.A.D.C.); *United States* v. *Ciotti*, 469 F. 2d 1204 (C.A. 3), vacated on other grounds, 414 U.S. 1151; *United States* v. *Mehciz*, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974. See also *Draper* v. *United States*, *supra*, 358 U.S. 307, 314. There is no reasonable basis for concluding that warrantless searches of this kind are reasonable but that a search of the footlocker is not; such a distinction, to borrow the court of appeals' own words, is a " 'gossamer thin' [one] which arresting officers could find impracticable, if not impossible, to follow" (Pet. App. 15a). See LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,"* 1974 Sup. Ct. Rev. 127, 141.

of a home, for which a warrant has traditionally been required, and the "immediate control" test was expressly designed to prevent rummaging akin to that occurring under a general warrant. Areas in which there is less historical or policy justification for a presumptive warrant requirement, such as the search of an automobile or, we submit, a footlocker validly seized in a public place, stand on an entirely different footing, and there is accordingly more room for a flexible standard in determining whether the search of a surrounding area incident to an arrest is reasonable. Indeed, in the one case that has invalidated an incidental search outside a building, the search was held to be defective because it was "too remote in time or place" from the arrest, rather than because it was too extensive, and the Court expressly acknowledged that "what may be an unreasonable search of a house may be reasonable in the case of a motorcar" and that the extent of a search incident to arrest depends, in part, upon "the place where [the suspect] is arrested." *Preston* v. *United States*, *supra*, 376 U.S. at 366-367.[41] See also *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220.

Even if a warrant would normally be required to search a footlocker on probable cause, incidental searches following an arrest provide safeguards that justify dispensing with the need for prior resort to a magistrate. Although a return must be made on a search warrant, property seized in a warrantless search not accompanying an arrest is not promptly accounted for to a judicial officer, nor is the pro-

[41] Moreover, as the Court noted in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 47, the defendants in *Preston* had been arrested for vagrancy, and "it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto."

priety of the seizure evaluated in any manner by such an officer, unless and until the person from whom the property is seized moves for suppression or return of the property. When the search follows an arrest, however, "there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search by his very presence at the scene, and having been arrested, he will soon be brought into contact with people who can explain his rights." *Chimel* v. *California, supra,* 395 U.S. at 782-783 (White, J., dissenting).

Finally, a probable cause search of a person's belongings following his arrest in a public place is reasonable, whether or not those belongings may have been within his immediate control, because of the greatly diminished expectation of privacy following an arrest. As Mr. Justice Powell observed in *United States* v. *Robinson, supra,* 414 U.S. at 237-238 (footnote omitted), "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of an arrest." In *United States* v. *Edwards, supra,* for example, the Court upheld the warrantless, probable cause search and seizure of an arrestee's clothing some 10 hours after his arrest. The Court concluded that the search was justified as incident to the arrest. But it also stressed the fact that the seizure was supported by probable cause, and it quoted with approval from the First Circuit's decision in *United States* v. *DeLeo, supra,* 422 F. 2d at 493, to explain why a warrant was unnecessary in the circumstances:

> While the legal arrest of a person should not destroy the privacy of his premises, it does— for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.

Under the reasoning of *Robinson* and *Edwards,* then, and in light of the specific situation to which *Chimel* was directed, the search of respondents' footlocker without a warrant following their arrest was reasonable. The police had probable cause both to arrest respondents and to search the footlocker, and the reason for the search was "closely related to the reason [respondents were] arrested." [42] There was therefore no danger of the kind of pretextual use of an arrest for an exploratory search that had prompted the limitation imposed by *Chimel.* Moreover, for the short duration following their arrests and the search of the footlocker, respondents' arrests took their "privacy out of the realm of protection from police interest in weapons, means of escape, and evidence," so that the inhibitions upon the search were insufficiently great to require a judicial determination of probable cause in advance. In sum, the agents' conduct satisfied the test of reasonableness under the Fourth Amendment.

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[42] *United States* v. *Edwards, supra,* 415 U.S. at 806, quoting *Cooper* v. *California, supra,* 386 U.S. at 61.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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